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October Term, 1924

No. 604

WALTER M. PIERCE, as Governor of the State of Oregon, [illegible] as Attorney General of the State of Oregon, and FRANK MYERS, as District Attorney for Multnomah County, State of Oregon, *Appellants*,

vs.

HILL MILITARY ACADEMY, a corporation, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF OF APPELLEE, HILL MILITARY ACADEMY

JOHN C. VEATCH,
*Attorney for Appellee.*

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# Supreme Court of the United States

OCTOBER TERM, 1924

**No. 584**

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon, *Appellants,*

*vs.*

HILL MILITARY ACADEMY, a corporation, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

## BRIEF OF APPELLEE, HILL MILITARY ACADEMY

### STATEMENT

At the general election held in the state of Oregon, in November, 1922, the people passed an act amending section 5259 Oregon Laws, which amendment provides that every parent, guardian or other person having control, charge or custody of a child under the age of sixteen years and over the age of eight years who shall fail

to send such child to a public school for the period of time a public school shall be in session in the district where such child resides, shall be guilty of a misdemeanor, and excepts from the provision of the act (a) children physically unable to attend school; (b) children who have completed the eighth grade; (c) children who live a certain distance from school; and (d) children who are being taught by a parent or private teacher, under certain conditions. The act further provides that it shall be and remain in force from and after the first day of September, 1926.

This appellee conducts a private school for boys at the City of Portland, Multnomah County, Oregon, a large per cent of the students attending its school being within the ages and in the grades prescribed in the act. This suit was instituted against the Governor and Attorney General of the state of Oregon and the District Attorney of Multnomah County, Oregon, as the law officers of the state, to restrain them from declaring the act to be a valid law of the state and from threatening to enforce it when it becomes effective by its terms. The District Court for the District of Oregon, granted the relief prayed for in the complaint, from which decree defendants appeal.

The bill of complaint in this case alleges that the act in question is unconstitutional and void in several particulars, but in presenting the case to the lower court, this appellee relied wholly upon the proposition that the act

is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives this appellee of its property without due process of law. We rely upon that ground in this court.

## ARGUMENT

The Governor and Attorney General have filed briefs herein contending that the act is a compulsory education measure and as such is a valid exercise of the police power of the state. No one will deny that the state has the power to promote education among its people and that laws designed and intended for that purpose are a valid exercise of the police power. The state has the power to compel children to attend school, and to regulate and control schools so as to insure certain standards in education. Nearly all states have adopted such laws and the validity of these laws has been repeatedly sustained by the courts. The Governor and Attorney General, however, seem to take the position that there is no limit to the exercise of this power and that a mere declaration on the part of the legislative body that the act is a compulsory education measure takes it out of the constitutional restrictions regardless of the conditions to which it may apply and regardless of individual rights which it may violate.

No legislative act of the state, no matter how little it may interfere with the liberty or property of the individual, is a valid exercise of the police power of the

state unless it is intended to correct an existing evil or promote some object it is competent for the state to promote, for without that restriction, life, liberty and property would ever be subject to arbitrary power.

The right of the individual to be secure in his life, liberty and property, unless the same be taken according to the established customs, or the law of the land, is older than written constitutions. When King John was compelled to confirm this principle in the Magna Charta, he was granting nothing new, but merely confirming that which had ever been regarded as a right of free men. It was afterwards confirmed in Parliament by Henry III, and in the reign of Edward I, declared to be the common law of the land. We find it in the Bill of Rights presented to Charles I, and in the bill presented by the Lords and Commons to the Prince and Princess of Orange; it is in the Body of Liberties of the Massachusetts Colony of 1641, and has been reaffirmed in the Fifth and Fourteenth Amendments to the Constitution of the United States.

At no time in history has it ever been regarded that restrictions could be placed upon these rights unless such restrictions were necessary to promote the public welfare.

> Thus the statute of King Edward IV, which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes

or boots of more than two inches in length, was a law that savored of oppression, because, however ridiculous the fashions then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility.

Sir William Blackstone, Book I, Chapter I.

Our courts have ever held that any restrictions upon the rights of the individual are arbitrary and oppressive unless such restrictions are intended to promote the public welfare and have a reasonable relation to that purpose.

It is also well established that, when a State, exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having a reasonable relation to that end as it may deem necessary in order to make its action effective.

Purity Extract Co. v. Lynch, 226 U. S. 192.

If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of the opinion that the act will fail in its purpose.

McLean v. Arkansas, 211 U. S. 539.

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the Government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is a reasonable relation to an object within the governmental authority, the exercise of legislative discretion is not subject to judicial review.

C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 549.

* * * if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety or welfare of the community, or that the means employed have no real or substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate boundary of police power.

Atlantic Coast Line v. Goldboro, 232 U. S. 559.

* * * that among the powers of the State not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to

such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished and are not inconsistent with its own constitution or the Constitution of the United States.

House v. Mayes, 219 U. S. 270.

In determining the validity of the ordinance in question it may be taken as firmly established in the jurisprudence of this court that the States possess, because they have never surrendered, the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health and comfort; * * * taking care always that no regulation, although adopted for those ends shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case. Equally well settled is the principle that if a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediencey.

Reduction Company v. Sanitary Works, 199 U. S. 306.

> Of course, in the exercise of the right of public interest as against such corporations, the demand must be reasonable and must clearly appear to be for the public welfare.
>
> C. B. & Q. R. R. Co. vs. Drainage Commissioners, 200 U. S. 561.

It then becomes material to determine the purpose for which this act was passed, the relationship of the act to the purpose and the reasonableness of the act in the light of the conditions to which it applies.

**The Purpose of the Act.**

It will be noted that the act, when presented to the people at the general election in November, 1922, was entitled, "A Bill for an Act to Propose by Initiative Petition to Amend Section 5259, Oregon Laws—Compulsory Education." (Trans., page 4.)

Section 5259, Oregon Laws, provides as follows:

> *Children Between the Ages of Nine and Fifteen Years.* Every parent, guardian or other person in the state of Oregon having control or charge of any child, or children between and including the ages of nine and fifteen years of age, shall be required to send such child, or children, to the public schools for the term or period of not less or more than the number of months of public school held annually in

the district in which such parent, guardian or other person in parental relation may reside; provided, that in the following cases, children shall not be required to attend public schools:

*(a) Children Being Taught in Private School.* Any child, or children, who is, or are, being taught for a like period of time in a private or parochial school, such branches as are usually taught in the first eight years in the public schools, or has or have, already acquired the ordinary branches of learning taught in such schools, the fact of which acquisition of such ordinary branches of learning by such child, or children, shall be determined by the school board in charge of the public school in such district;

*(b) Children Physically Unable.* Any child, or children, who is, or are, physically unable to attend school. In such cases the truant officer shall require a written statement of a competent physician certifying that such child, or children, is, or are, physically unable to attend school;

*(c) Distance from School.* Children between the ages of nine and ten years of age whose parents live more than one and one-half miles, and children over ten years of age whose parents live more than three miles, by the nearest traveled road, from some public school; provided, that if transportation is

furnished pupils in said district this exemption shall not apply;

*(d) Private Instruction.* Any child, or children, who is, or are, being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school, but before such child, or children, can be taught by a parent or private teacher, such parent or private teacher must receive written permission from the county superintendent, who is hereby authorized to grant such permission only in case of necessity and such permission shall not extend longer than the end of the current school year. Such child, or children, must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If after such examination the county superintendent shall determine that such child, or children is, or are, not being properly taught, then the county superintendent shall order the parent, guardian or other person in parental relation to send such child, or children to school the remainder of the school year. Failure on the part of the parent, guardian or other person in parental relation to comply with the order of the county superintendent shall render such person liable to the penalty provided for in this act.

Sec. 5259, Oregon Laws.

The amendment to this act (Trans., pp. 4-5) changes the ages for compulsory attendance from nine and fifteen years to eight and sixteen years and omits paragraph "(a)", relating to private schools. The intent and purpose of the present law is to compel children to attend school for a certain length of time or until they have reached a certain standard of education. The amendment adds nothing to the law now in force in so far as the standard of education is concerned, but it prevents children within the prescribed ages and within the elementary grades from attending private schools.

The Governor and Attorney General, while admitting that the purpose of the act is to compel attendance at public schools and thus prevent children from attending private schools, claim that since the act is labeled a compulsory education measure, it should be considered on that ground alone. When there is doubt as to the interpretation of a statute, the legislative intent must govern, but the legislature cannot change the plain meaning of a statute by giving it a title different from its intent, nor could the legislature by declaring in so many words that the act is intended to promote education by compelling children to attend the public schools take the act from the limitations placed upon the police power of the State.

That the legislature is not the final judge of the limitations of the police power, and that such enact-

ments are subject to the scrutiny of the courts and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property is well settled by former decisions of this court.

Silz v. Hesterberg, 211 U. S. 31.

It must be conceded that there is a limit to the valid exercise of the police power of the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair and reasonable and appropriate exercise of the police power of the State, or

is it an unreasonable and unnecessary and arbitrary interference with the rights of the individual in his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family. * * * The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Lochner v. New York, 198 U. S. 45.

The Attorney General contends (Brief, page 35) that the act does not prevent children within the prescribed ages from attending private schools as they could attend such schools at other times than the regular school hours. What might be the effect of the act, or what could be the effect of the act, is not a proper question for the court's consideration, but what, in the light of all reason, will be the effect of the act is the basis for determining its validity.

The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect.

Mountain Timber Co. v. Washington, 243 U. S. 219.

> In whatever language a statute may be framed, its purpose must be determined from its natural and reasonable effect.
>
> Henderson v. Mayor of New York, 92 U. S. 259.

No interpretation can be placed upon this act other than that it is intended to prevent children between the ages of eight and sixteen years and in the elementary grades from attending private schools. That is its plain meaning and intent and that is the interpretation placed upon it by appellants in this case. But the Attorney General claims that, even if this is the intent and purpose of the act, it will not prohibit the business of conducting private schools because such schools could still be conducted for children under and over the ages specified in the act. The validity of the act is not determined by the amount of business it destroys. If it is within the power of the State to take away the business of the private school in the elementary grades, it is equally within the power of the State to take away their business in all grades.

In the case of *Adams v. Tanner*, 244 U. S. 590, the State of Washington passed an act making it unlawful for any employment agent, his representative or other person to demand or receive a fee from any person seeking employment for furnishing him or her with employment or information leading thereto. It was

contended in that case that the act was not intended to and did not prohibit the business of conducting an employment agency since such agencies could collect their fees from those seeking laborers instead of from those seeking employment. The Court held that, while the fees might be collected from the employers, the act, in fact, prohibited the business because it could not exist with the restrictions placed upon it.

> To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. "You take my house when you take the prop that doth sustain my house; you take my life when you do take the means whereby I live."
>
> Adams v. Tanner, 244 U. S. 590.

This act is not designed and intended to promote compulsory education. It adds nothing to the standard of education, it does not broaden the educational field; the changing of the ages for compulsory school attendance is in no way affected by the clause relating to private schools. All compulsory educational laws of the various states are on the same general plan as the Oregon law; they require that children within certain ages shall attend public school except where they are receiving the same standard of education from other sources. The whole intent and purpose of such laws is that chil-

dren shall receive a certain standard of training, not that they shall be educated in public schools or in any particular school or manner.

> The great object of these provisions of the statute has been that all children shall be educated, not that they shall be educated in any particular way. To this end public schools are established, so that all children may be sent to them unless other sufficient means of education are provided for them.
>
> Commonwealth v. Roberts, 159 Mass. 372.

**The Relation of the Statute to a Competent Purpose.**

That the police power of the State is very broad has never been denied. The State may exercise this power to promote and protect the health, morals, safety, convenience, comfort and general welfare of its people; to protect its people from fraud, oppression and vice; to promote the prosperity, good order and tranquility of its citizens. But there must be a real connection between the statute and a competent purpose; it must be a means to an end, and the means must be reasonably adapted to accomplish the purpose. (*Purity Extract Co. v. Lynch*, 226 U. S. 192; *McLean v. Arkansas*, 211 U. S. 539; *Atlantic Coast Line v. Goldboro*, 232 U. S. 559; *Reduction Co. v. Sanitary Works*, 199 U. S. 306; *Lochner v. New York*, 198 U. S. 45; *Lawton v. Steele*, 152 U. S. 133; *Helena v. Dwyer*, 64 Ark. 424; *Health Depart-*

*ment v. Trinity Church,* 145 N. Y. 32; *State Board etc., v. Greenville,* 86 Ohio St. 1; *Laurel Hill Cemetery v. San Francisco,* 152 Cal. 464; *Smiley v. McDonald,* 42 Neb. 5; *Aetna Fire Ins. Co. v. Jones,* 78 S. C. 445; *Wolf v. Smith,* 149 Ala. 457; *Wilson v. Cook,* 54 Colo. 320; *Young v. Lemineux,* 79 Conn. 434; *People v. Wilson,* 249 Ill. 195; *Republic Iron & Steel Co. v. State,* 160 Ind. 379; *Hubbell v. Higgins,* 148 Ia. 36; *Durgin v. Minot,* 203 Mass. 26; *State v. Wagner,* 77 Minn. 483; *Carthage v. Frederich,* 122 N. Y. 268; *People v. Hawkins,* 157 N. Y. 1; *State v. Williams,* 146 N. C. 618; *State v. Boone,* 84 Ohio St. 346; *Black v. Swartz,* 27 Utah 387; *State v. Redmon,* 134 Wis. 89; *Meyer v. Nebraska,* 262 U. S. 290.)

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.
>
> Lawton v. Steele, 152 U. S. 133.

In statutes involving the exercise of the police power, it can usually be determined from the statute itself what evil is intended to be corrected or what good is to be accomplished by the legislation. The court can

usually say from the terms of the act, that it applies to the health, the morals, the safety or the general welfare of the people. And the courts can also usually determine, either from the terms of the statute, or from general knowledge of the matters to which it applies, or from facts before the court in the particular case, whether or not the statute has a reasonable relation to the purpose it is intended to accomplish. However, in this case, it neither appears from the terms of the statute, from matters of common knowledge nor from any fact in the record, what evil the legislation is intended to correct or what good it is intended to promote. It is significant that appellants, after months of contemplation, are unable to designate the particular purpose of the statute. A public danger cannot be very great or a public necessity cannot be very pressing if learned counsel, after a long and painstaking effort, cannot locate it. Appellants, however, have made several suggestions as to what the evil might be and as to what good might be accomplished by preventing children from attending private schools, but no where in the briefs of either the Attorney General or the Governor does there appear a single fact, a single citation of authority, or a word about local conditions in the State which would warrant the Court in concluding that the prohibition of this business would in any way protect the people from an evil or promote the general welfare of the citizens of Oregon.

We will consider this act from the standpoint of the objects which the Governor and the Attorney General

suggest it might have been intended to promote for the purpose of determining whether or not it can reasonably be said that the legislation will accomplish any of these purposes. The only purposes that we have been able to glean from the briefs of these state officers are: (1) That the education and assimilation of the foreign-born can best be accomplished in the public schools; (2) that the increase in crime among children might be due to private schools; (3) that religious prejudice is increased by the two school systems; (4) that private schools might be conducted by bolshevists, communists and syndicalists; (5) that the instruction in private schools is inferior to the instruction in public schools and (6) that private schools might develop until they destroy the public school system.

**The Assimilation of the Foreign-Born.**

In this connection, it should be remembered that the vast majority of children not now attending the Public Schools of Oregon who will be compelled to do so by the new statute, are either themselves immigrants ~~are~~ or the children of immigrants.

Surely a State can require of all immigrants admitted to all the advantages and opportunities of life in the United States, that their children may be taught by the State the English language, and the character of American institutions and government.

Governor's Brief, page 40.

The school reports for the state of Oregon do not segregate children according to parentage, so that it is necessary to take the year 1920 as a basis of comparison in order to make use of the census figures. There is a slight variation between the census figures and the report of the Superintendent of Public Instruction of the State of Oregon, for the year 1920, but the variation is not material. The figures from these two sources show that in 1920, the total enrollment in all schools of the state was 156,889. Of this number, 148,412 were in the public schools and 8,477 in private schools. There were 3,170 foreign-born children and 30,800 children of foreign-born or mixed parentage, between the ages of 5 and 20 years, attending school. It thus appears that 21.6% of the school children would be affected by the policy of assimilation. If all the children in private schools were immigrants or the children of immigrants, they would constitute but 25.4% of such children in the schools of the state, and but .05.4% of the total number of children attending school.

But the children in the private schools of Oregon are neither immigrants nor the children of immigrants. It is a matter of common knowledge that private schools are financed wholly or partly by tuition received from the students. The tuition charges are usually quite substantial; the fee charged by the appellee in this case is $800.00 per annum for each student (Trans., page 3). Immigrants, especially those who are in the greatest

need of assimilation, cannot afford to send their children to private schools.

But assuming that foreign-born children and the children of foreign-born parents were attending private schools in the same proportion that such children bear to the whole number of school children of the state, this legislation could reach but .05.3% of the children in need of assimilation.

Is there any good reason to suppose that such children can not be assimilated in the private schools? Are they instructed any differently; do they have less opportunity to associate with native-born children than they would have in the public schools? The laws of Oregon now provide that children in private schools shall be taught for a like period of time "such branches as are usually taught in the first eight years in the public schools." (Sec. 5259, Oregon Laws); that they shall be given instruction in the Constitution of the United States:

> In all public and private schools located within the state of Oregon, commencing with the school year next ensuing after the passage of this act, there shall be given regular courses of instruction in the constitution of the United States.
>
> Chapter 7, General Laws of Oregon, 1923.

And the laws also provide that all teachers in private schools shall take an oath of allegiance.

Section 1. Any person entering into a contract to teach in the public schools of the state shall, as a part of the contract, subscribe to the following oath or affirmation:

"I solemnly swear, or affirm, that I will support the constitution of the State of Oregon * * * and the laws enacted thereunder, and that I will teach, by precept and example, respect for the flags of the United States and of the State of Oregon; * * * reverence for law and order and the undivided allegiance to the government of our country, the United States of America."

The said oath or affirmation, duly signed, shall be filed in the office of the examiner issuing the certificate and a copy shall be given to the applicant making the oath and affirmation.

Section 2. Every teacher now or hereafter employed in a private or parochial school or in any academy, college, university or other institution of learning in this state shall, before entering upon the discharge of his or her duties, take the same oath or affirmation of allegiance as that prescribed for public school teachers in Section 1. Such oath or affirmation shall be taken and subscribed to before some officer authorized by the state to administer oaths, and a copy of the oath or affirmation shall be filed with the officer or board in charge of such

private or parochial school or other institution of learning.

The above requirements shall not apply to exchange professors or teachers whose term of service is temporary, and who do not become permanent residents of the United States.

Chapter 115, General Laws of Oregon, 1921.

And further provides that instruction shall be given in the English language:

It shall be unlawful for any board of school directors, regents, or trustees, or for any teacher or other person teaching the public or private schools in the State of Oregon, to cause to be taught or to teach any subject or subjects, other than foreign languages, in the public or private schools in the State of Oregon in any language except English

* * *

Section 2223-3, Oregon Laws.

The State of Oregon is not confronted with any serious problem of assimilation. The 1920 census shows that 85.1% of our population is native-born white. Of a total foreign-born population of 102,151, the majority, 70,901, come from the countries of northern Europe. Canada and the British Isles furnish 30,725 of our immigrants, and Germany and the Scandinavian countries furnish the next largest number. These immigrants have always been considered as highly desirable and are

easily assimilated with our population. The census further reveals that the foreign-born population is not centered in any locality but is scattered throughout the state. They are not congregating in centers and establishing private schools for the purpose of preserving the ideals of their native lands.

The lack of assimilation of the alien is not an existing evil in this state, but if it were, are there any facts or circumstances upon which the Court could conclude that this legislation is the means for accomplishing that end or has a reasonable relation to the purpose?

**Increase in Crime.**

> The voters of Oregon who adopted the new School Law for their State had the right to base their action on the belief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who are not attending public schools, was more than a coincidence.

Governor's Brief, pp. 39-40.

Statistics on juvenile crime are available to every one, but no where does it appear that there is any connection between this condition and private schools. But there is this to be said for counsel's suggestion—it is at least novel. The connection is certainly not apparent enough to enable the court to say that the elimination of

the elementary grades in private schools is a means to an end in so far as correcting juvenile crime is concerned.

**Increase in Religious Prejudice.**

> The voters in Oregon might also base their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded.
>
> Governor's Brief, page 40.

Written history covers a period of many centuries and across the pages of that record runs the story of religious prejudice with its resultant wars and oppression. If there is one lesson that the human race has learned from its past experience it is that religion cannot be forced upon any people or taken away from any people by law. Man's right to hold to any religious belief and to pass that belief on to his posterity is as inherent as his right to live. Counsel speak of the "rising tide of religious suspicion," but there has never been a period in history when that tide was so low. There is more universal toleration of religious beliefs in the world today than at any time in the past. But if that

tide were rising, could it with reason be said that it is the result of private schools? The census of 1920 shows that there were 23,777,705 school children in the United States. The reports of the Bureau of Education of the Department of the Interior of the United States for 1920, show a total enrollment in all private schools of 184,153. Of this number, 130,019 were in private schools conducted by religious denominations. What effect on religious prejudice can one hundred and thirty thousand have on twenty-three million? In Oregon, but 3.4% of the school children of the state at the present time are in private schools. The reports of the Superintendent of Public Instruction do not segregate these schools according to religious denominations, but if all the private schools of Oregon were denominational schools, teaching one particular religious belief, the percentage is too insignificant to have any effect upon the whole. Private schools existed long before the public schools, they were formerly the only means offered for educating the children of the land. If they were the means of fostering religious prejudice has not this evil corrected itself by the growth of the public schools? Is it competent for the State to legislate to correct an evil that has spent its force?

**That Private Schools Will Be Conducted by Those Who Are Disloyal.**

If the Oregon School Law is held to be unconstitutional it is not only a possibility but almost a

certainty that within a few years the great centers of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside.

Can it be contended that there is no way in which a state can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

Governor's Brief, page 46.

The police power may be used to correct an existing evil and there may be cases where it might be used to prevent an evil that is certain to come, but we know of no cases upholding the use of the police power to prevent and purely theoretical and speculative injury. We can only judge the future by the past and the past history of private schools shows no such tendency as counsel predict. But the danger of such schools in the state of Oregon is very remote:

(c) Any person who, by word of mouth or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabbotage, or who shall advocate, affirmatively suggest or teach the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or

persons, or the commission of any crime or unlawful act as the means of accomplishing or effecting any industrial or political ends, change or revolution, or for profit, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbills, poster, document or written or printed matter in any form whatsoever, containing matter advocating, advising, affirmatively suggesting or teaching crime, criminal syndicalism, sabbotage, the doing of any act of physical violence, the destruction or damage to any property, the injury to any person, or the commission of any crime or unlawful act as the means of accomplishing, effecting or bringing about any industrial or political ends, or change, or as a means of accomplishing, effecting or bringing about any industrial or political revolution, or for profit, or who shall openly, or at all attempt to justify by word of mouth or writing, the commission or the attempt to commit sabbotage, any act of physical violence, the destruction of or damage to any property, the injury of any person or the commission of any crime or unlawful act, with the attempt to exemplify, spread, or teach, or affirmatively suggest criminal syndicalism, or organizes, or helps to organize or becomes a member of, or voluntarily assembles with any society or assemblage of person which teaches, advocates or affirmatively suggests the doctrine or criminal

syndicalism, sabbotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as the means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine.

Section 2025-1 subd (c), Oregon Laws.

**That Instruction in Private Schools Is Inferior.**

In this case it is to be presumed that the legislature and the people of the state investigated the question of the necessity of such legislation and found and determined, as a question of fact, that the instruction given to children of the ages affected by the amendment in the public schools of the state was better and more complete than that provided by private institutions; * * *

Brief of Attorney General, page 47.

The law of the state now provides that private schools shall teach "such branches as are usually taught in the first eight years in the public schools." (Sec. 5239, Oregon Laws.) Section 4915, Oregon Laws pro-

vides for a Superintendent of Public Instruction; section 4918, defines his duties:

> 4. Secure Information. He shall visit in person when practicable all of the chartered educational institutions of the state, and shall secure such statistical information relative to the number of students, teachers, value of property, libraries, salaries, and courses of study, as he may deem advisable for the advancement of education and for the information of the legislature;
>
> Sec. 4918, subd. 4, Oregon Laws.

Section 4919, provides that he shall make reports to the legislature, such reports to contain, among other things, "any and all information that in his judgment may be useful to the public and for the advancement of the educational interests of the state." No where does it appear in the reports of the Superintendent of Public Instruction that the educational work of the private schools is insufficient. The presumption is that the Superintendent has made the investigations and correctly reported the conditions. If the legislative body found and determined "as a question of fact" that the instruction in private schools was so inferior as to warrant legislation of this nature, surely some of the facts upon which the determination was made would be available to the Attorney General to place before this Court.

Private schools are charging for a service which the

State offers free. If they maintain their patronage they must not only offer as much as is offered by the public schools but must go further and offer something in addition to the usual public school course. Self preservation alone would maintain the educational standards of private schools.

**That Private Schools Might Destroy the Public School System.**

> If a few such institutions can lawfully be maintained, the number which may ultimately be so maintained can not consistently be limited, and if this court should hold that the state does not have the right to require all children within its borders to be educated in its public schools, such institutions may, without constitutional restriction, develop a system of educational training which will result in doing away with public schools.
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> Brief of Attorney General, page 37.

The history of education in this country is too well known to be reviewed here. The reports of the Bureau of Education of the Department of the Interior show an ever greater percentage of children attending the public schools. While the reports will show an increase in the number of private schools, the percentage of increase in these schools is less than in the public schools. The increase in private schools is confined to sectarian schools

which do not depend entirely upon tuition for support and can longer stand the competition of the public school system. Non-sectarian schools which depend entirely upon tuition have greatly decreased in number. This has been the tendency for many years and the conditions in Oregon are no different than the conditions throughout the country. The reports of the Superintendent of Public Instruction for the State of Oregon, show that in 1910, the enrollment in the public schools in this state was 118,412 and in the private schools 6,233; in 1924, the numbers were 175,510 in the public schools and 5,994 in private schools.

That the educational system of Oregon is not being hampered by the private schools is shown by the last report of the Superintendent of Public Instruction showing that Oregon ranks third among the state of the Union in illiteracy; but two states in the Union have a higher average daily attendance in the schools, and but three states in the Union have a higher percentage of high school attendance.

### The Power of the State.

The power of the State to protect the health, morals, safety, and promote the prosperity, convenience and general welfare of its people is just as much a natural and inherent power of government as is the right of life, liberty and property a natural and inherent right of the individual. Neither the power of the State nor the right

of the individual is supreme, for the supremacy of the power of the State would lead to oppression, and the supremacy of the right of the individual would lead to chaos. While no rule of law defines the limits of the State's power, the principle, based upon the universal decisions of the courts, is that the power shall not interfere with the rights of the individual, unless such interference is necessary to promote the public welfare and the restrictions placed upon the individual's rights have a real, substantial, and direct relation to the object to be accomplished. The restrictions must be the means to accomplish that which is necessary for the welfare of the public.

> The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be passed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstances. Any attempt to fix a rigid boundry would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts, in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the

preservation against arbitrary restraint of the liberties of its constituted members.

Adkins v. Childrens Hospital, 261 U. S. 525.

The legislative power of a state can only be exerted in sub-ordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

Truax v. Corrigan, 257 U. S. 312.

When we consider the nature and theories of our institutions and government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to the law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the

law is the definition and limitation of power. It is, indeed quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men."

Yick Wo v. Hopkins, 118 U. S. 356.

Whether or not any act on the part of the State goes beyond the limitations placed upon the police power depends upon the facts and circumstances surrounding each case, and the fact that the legislature has determined that the prohibition of a business or calling is necessary to protect the public welfare does not make it so.

Another principle involved in the exercise of the police power, which it is hardly necessary to state,

is that a mere legislative declaration that a business or occupation, harmless and innocous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of surrounding conditions the declaration can be said to accord with the fact as based upon common observation and common experience. The legislature cannot by its mere *ipse dixit* make that a guilty thing which is intrinsically an innocent one. It would be idle, for instance, for the Legislature to declare that the occupation of farming or horticulturist was in its nature inimical to the public interest and to undertake to regulate the hours of the day in which the work of those great industries should be prosecuted. Such an attempt would, under existing conditions, at least, be treated only with derision, as falling wholly without the bounds of reason, and as involving a mere arbitrary attempt to interfere with the liberty of the citizen. In other words, any attempt at police regulation which interferes with the individual in the conduct of an innocent and legitimate business must have an appreciable relation to some public evil justly to be apprehended, and be reasonably calculated to avoid such evil.

Yee Gee v. City and County of San Francisco, 225 Fed. 757.

Though this act by its terms does not prohibit the business of conducting a private school, those who are engaged in that business are not estopped from claiming the protection of the Constitution against the injurious effects of the legislation.

> The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.
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> Mugler v. Kansas, 123 U. S. 623.

It is the practical operation and effect of the legislation and not its terms or avowed purpose that determines its validity. A bill may be enacted for one purpose, but its practical operation may reach matters entirely beyond its intent, and its validity is determined by what it does and not by what it was intended to accomplish. The state of Minnesota passed an act providing that no fresh meats should be sold within the

state unless inspected by a local inspector in Minnesota within twenty-four hours before slaughter. The act was entitled an act for the protection of public health but it was held in the case of *Minnesota v. Barber,* 136 U. S. 313, that the practical operation of the act was a restriction upon interstate commerce. The state of New York passed an act providing that the captain of every ship arriving in New York should, within twenty-four hours after arrival, post a bond in the sum of $300 for each passenger arriving on his vessel from a foreign port, to protect the city of New York and other cities of the state from such passenger becoming a public charge, but that the captain could avoid posting the bond if he would, within the time specified, pay the sum of one dollar and fifty cents for each of such passengers, and in case he failed to either post the bond or pay the specified sum he would be liable to a penalty of $500 which should be a lien on the vessel. This act applied to the master and owners of the vessel; its avowed purpose was to protect the public against the support of pauper immigrants, but it was held in *Henderson v. Mayor of New York,* 92 U. S. 259, that the practical effect of the act was a tax on the passengers.

So the practical operation and effect of this act is to prohibit the business of conducting private schools as it takes away from such business the means by which it exists.

Can this business be prohibited in the absence of a clear showing that such prohibition is necessary to protect or promote the public welfare? Appellants cite the various liquor laws in support of their contention that the State may absolutely prohibit a business whenever, in the judgment of the legislature, such prohibition is necessary. The right to engage in the liquor business has never been considered an inherent right. It is a business that has always been regarded as harmful and vicious, existing not as a matter of right but by permission and being always subject to the legislative will.

> For we cannot shut out of view the facts within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil.
>
> Mugler v. Kansas, 123 U. S. 623.

A statute of California gave a board of supervisors power to grant or refuse licenses to conduct laundries in certain classes of buildings within the city of San Francisco. This statute was before the Court in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, and was held to be unconstitutional and void. A similar act gave a like power to a similar board in the same city to grant

or refuse licenses to conduct retail liquor businesses and this statute was sustained in the case of *Crowley v. Christensen*, 137 U. S. 86, wherein the two classes of businesses are distinguished:

> There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost is evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States.
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> * * * * * *
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> It will thus be seen that that case (Yick Wo v. Hopkins) was essentially different from the one now under consideration, the ordinance thus held invalid vesting uncontrolled discretion in the board

of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.

Crowley v. Christensen, 137 U. S. 86.

No person has an inherent right to do that which, in the judgment of all men, is harmful, vicious and dangerous to the welfare of the community. There is no inherent right to sell opium, conduct a house of prostitution, or maintain a gambling establishment. All such businesses may be prohibited at the will of the legislative body, but this power of the legislature does not extend to businesses that have ever been regarded as useful and beneficial to the community.

There are other businesses, while not in themselves vicious or harmful, are classed as non-useful occupations, and which under certain circumstances may become vicious and harmful. Such businesses may also be prohibited in the interest of the health, the morals and general welfare of the public and the necessity of such prohibition is largely within the discretion of the legislative

body. Thus the business of speculating on the market might be prohibited (*Booth v. Illinois,* 184 U. S. 425); so might the business of conducting a billiard hall be prohibited (*Murphy v. California,* 225 U. S. 623).

> The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But between the useful business which may be regulated and the vicious business which may be prohibited lie many non-useful occupations, which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.
>
> Murphy v. California, 225 U. S. 623.

We find, however, no instances of a distinctly useful and beneficial business being absolutely prohibited by statute. The business in which this appellee is engaged has ever been regarded as a distinctly useful and beneficial business and an asset to any community. In all the years that this business has been conducted in this country, its beneficial effects have never been questioned, and the occupation has been encouraged, not only by public sentiment but, in some states, by con-

tributions from the public funds. It may be true that some private schools are not properly conducted; it may be true that there are some schools in the state of Oregon that do not measure up to proper standards, but if that be the case, there is nothing about them that cannot be controlled by proper regulations which the State has the power to prescribe and which the state does prescribe.

> Because abuses may and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its supression would be in the public interests. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.
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> Adams v. Tanner, 244 U. S. 590.

The facts do not reveal that this legislation has any real, substantial and direct relation to any competent

policy of the State, or that it is reasonably necessary to correct an existing evil or promote the general welfare of the people. It is absurd to say that private schools are responsible for juvenile crimes or that they are being conducted by those who are disloyal to our government. There is not a single fact or single authority sustaining the assertion that these schools are preventing the assimilation of the foreign-born, or are endangering the public school system, or increasing religious prejudice, or are not giving proper instruction. All these propositions have been advanced as excuses and not as reasons, and it cannot be said that the legislation has any reasonable relation to any of them.

In all our history the police power has never been extended to the destruction of a useful and beneficial business. The decisions of our courts are all in accord that such businesses may not even be regulated beyond the necessities of the case, to hold otherwise is to take all protection from the individual and give unlimited latitude to arbitrary power.

If there be a condition in the private schools of Oregon, which we do not admit, that needs correcting for the best interests of the public, the remedy for that condition is in proper regulation, which is clearly within the power of the state. If the State may prohibit this useful business because it is not properly conducted, it may, on the same theory, prohibit any business in which its people are engaged. There is nothing more im-

portant to the welfare of a community than a pure milk supply, but the state has not the power under the guise of protecting public health, to say that it shall be unlawful to purchase milk from any dairy except that conducted by the state. When the state of Oregon undertook to strangle the business of this appellee by denying to it the patronage upon which its business depends, the state exceeded its powers of sovereignty and deprived this appellee of its property without due process of law. (Adams v. Tanner, 244 U. S. 590; Meyer v. Nebraska, 262 U. S. 290.)

**Right to Maintain the Suit.**

The right of appellee to maintain this suit has been questioned, though it is admitted that appellee is now losing a part of its business by reason of the existence of the statute and the threat on the part of the appellants to enforce it when it becomes effective by its terms, and that the enforcement of the act will wholly destroy its business. The jurisdiction of a court of equity under such circumstances is well established.

> Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state, is clothed with the duty of enforcing its laws and who

threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal Court of equity.

Terrance v. Thompson, 263 U. S. 197.

It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainants rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in proctecting the complainant from injuries which, if inflicted, would be wholly destructive of his right.

Vicksbury Waterworks Company v. Vicksburg, 185 U. S. 65.

> Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them before invoking the equitable relief to which they are entitled under the circumstances.
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> Detroit Creamery Co. v. Kinnane, 264 Fed. 845.

The injunction was not granted by the lower court wholly to prevent a future injury but to stay an injury now in progress and which will become more severe as the time for the enforcement of the act approaches. If there is any substance to that great maxim that "equity will not suffer a wrong to be without a remedy," this appellee is clearly entitled to come before the court and ask to be protected in its pursuit of a useful and legitimate business.

**Conclusion.**

While we have presented this case wholly on the theory that it deprives this appellee of its property without due process of law, we do not wish to be understood as contending that the constitutional questions involved in this legislation is confined to that one proposition. While the State has the power to require that all its citizens shall receive instruction in certain things, we do not believe that the State has the power to say that education shall not go beyond the instruction it offers. A law which prescribes that all shall attend one school, limits education to the instruction offered in that school. Individual freedom to pursue any educational

course that may seem best cannot be denied, and the State has no power to control this choice beyond placing minimum requirements. Parents are at liberty to say that their children shall receive certain instruction in addition to the instruction required by the State and it matters not whether that instruction is in religious matters, military tactics, physical training or anything else so long as it does not interfere with the rights of others.

This appellee is engaged in the business of conducting a private school for profit and is particularly concerned with its right to continue that business, but the liberty of the individual might well be considered in connection with the rights of appellee because restrictions upon the liberty of the individual has a direct relation to the business of appellee.

The legislation in question was not conceived by any public necessity and is not designed and intended to correct an existing evil or promote the public welfare. The designation "compulsory education" attached to the measure is an excuse and not a reason for its enactment. It adds nothing to the policy of compulsory education; it does not broaden the field nor does it raise the standard. Its effect is to destroy the business of those who are engaged in conducting private schools without serving any purpose of public utility. No legislation interfering with the freedom of the individual or the rights of property has ever been upheld under such

conditions and there is not a fact in the record of this case upon which this legislation can be sustained.

Respectfully submitted,

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